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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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Commissioner

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Commissioner

KRISTIN MAYES

Commissioner

Arizona Corporation Commission

DOCKETED

JUL 19 2006

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nr

**IN THE MATTER OF LEVEL 3
COMMUNICATIONS, LLC'S PETITION FOR
ARBITRATION PURSUANT TO SECTION
252(b) OF THE COMMUNICATIONS ACT OF
1934, AS AMENDED BY THE
TELECOMMUNICATIONS ACT OF 1996,
AND THE APPLICABLE STATE LAWS FOR
RATES, TERMS, CONDITIONS OF
INTERCONNECTION WITH QWEST
CORPORATION**

DOCKET NO. T-03654A-05-0350
T-01051B-05-0350**QWEST CORPORATION'S APPLICATION FOR
REHEARING AND MODIFICATION OF ORDER**

Pursuant to Arizona Revised Statutes § 40-253 and A.A.C. § R14-3-111, Qwest Corporation ("Qwest") hereby files its Application for Rehearing and Modification of the Opinion and Order in Decision No. 68817, entered in this docket by the Arizona Corporation Commission ("Commission") on June 29, 2006 ("*Commission Order*").

Specifically, Qwest seeks reconsideration and modification of the following portions of the *Level 3 Arbitration Order*:

1. Portions of the Resolution section on pages 25 through 30, wherein the Commission declined to determine the scope of the *ISP Remand Order*, in which the Commission adopted language that is ambiguous and potentially inconsistent with the

1 law, and in which the Commission did not adopt an amendment to section 7.3.6.1 of the
2 interconnection agreement ("ICA") that would make it consistent with the Commission-
3 adopted definition of "VNXX." In that regard, Qwest requests that the Commission
4 modify those pages by adopting the amendments set forth in Attachment A, which is an
5 updated version of a proposed amendment in Qwest's exceptions. It has been updated
6 include a discussion of two additional federal circuit court decisions that have been
7 rendered since June 29, 2006, the date the *Commission Order* was issued. Thus, on this
8 point, Qwest specifically asks, for the reasons set forth below, that the Commission
9 reconsider its decision and modify the same by adopting the amendments set forth in
10 Attachment A.

11 2. Portions of pages 55 and 56 the *Commission Order* relating to operational audits
12 and certification related to VoIP traffic. The specific amendments are set forth on
13 Attachment B, which is identical to an amendment proposed as part of Qwest exceptions.

14 3. One sentence of page 72 of the *Commission Order* in order to add two section
15 numbers from the Qwest proposed language, as set forth in the first amendment set forth
16 on Attachment C. Qwest believes these sections were inadvertently omitted.

17 4. Finally, while not seeking reconsideration of the new ordering provisions adopted
18 during the open meeting and inserted in page 82 of the *Commission Order*, Qwest offers
19 a few brief comments with regard to those new provisions.
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I. ARGUMENT

A. **The *Commission Order* Should Be Amended To Conclude That Only Calls Placed to an ISP Located in the Same Local Calling Area as the Calling Party are Subject to the *ISP Remand Order*'s Compensation Scheme (Attachment A).**

The *Commission Order* declines to decide whether the *ISP Remand Order*¹ is limited to calls placed to an ISP in the same local calling area ("LCA"). (*Commission Order* at 28). The *Commission Order* adopts an approach that bans VNXX beginning 60 days following the effective date of the order (*Commission Order* at 82) and orders a docket including industry and Staff that addresses the broad question of the public policy underlying VNXX and whether it is in the public interest. (*Id.*). Qwest agrees with those conclusions, and notes that broad input is essential before the traditional call rating method is subjected to wholesale changes.

Nevertheless, Qwest strongly urges the Commission to nonetheless find that the *ISP Remand Order* prescribes intercarrier compensation only for calls placed by a caller to an ISP located in the same LCA. The scope of the *ISP Remand Order* is not an issue that arises solely in the context of VNXX traffic. It is an issue that arises anytime calls are placed to an ISP located in a different local calling area than the calling party. Under Arizona law, long distance calls to an ISP are interexchange calls that are subject to the existing access charge rules. Furthermore, in Decision No. 68820 (the Pac-West Complaint docket), the Commission characterized the law in this area as unsettled (Qwest is filing a contemporaneous Petition for Rehearing and Modification in with regard to Decision No. 68820). The fact is, however, that, in light of four decisions by federal circuit courts (two of which were issued since the date of the *Commission Order*), the law on this issue is well settled. Those cases are absolutely clear and

¹ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Red 9151 (2001) ("ISP Remand Order")

1 unequivocal that the *ISP Remand Order* applies only to local ISP traffic and that existing
2 intrastate access charge regimes (including Qwest's intrastate access charges) remain subject to
3 state commission jurisdiction. Qwest's intrastate access tariffs thus remain in effect and may not
4 be altered without notice and hearing.

5 Two cases decided before the *Commission Order*, *WorldCom, Inc. v. FCC*²
6 ("*WorldCom*") and the First Circuit's decision in *Global NAPs v. Verizon New England*³ ("*Global*
7 *NAPs I*"), conclusively rule that the *ISP Remand Order* applies only to local ISP-bound traffic
8 (thus excluding all VNXX ISP-bound traffic). Moreover, those two decisions since the
9 *Commission Order* was entered reaffirm the holding of *WorldCom* and *Global NAPs I*.
10 Consistent with these clear holdings, the Commission should rule that only local ISP traffic is
11 subject to the compensation regime of the *ISP Remand Order*.

12 Totally aside from the federal circuit court decisions discussed below, an analysis the *ISP*
13 *Remand Order* itself demonstrates conclusively that the *ISP Remand Order* applies only to local
14 ISP traffic.⁴ With the four federal circuit court decisions, that question is no longer subject to
15 any reasonable debate.⁵

16 ² 288 F.3d 429 (D.C. Cir. 2002).

17 ³ 444 F.3d 59 (1st Cir. 2006).

18 ⁴ Among those reasons were the fact that the context and language *ISP Remand Order* is
19 clear that the only issue being considered by the FCC was local ISP traffic (*ISP Remand Order*
20 ¶¶ 10-13), a proposition that is confirmed by FCC's unequivocal statements that it had no intent
21 to interfere with either the interstate or intrastate access charge regime that applies to
interexchange calls (*Id.* ¶¶ 34-41). Those reasons alone are more than sufficient to conclude that
the *ISP Remand Order* applies only to local ISP traffic.

22 ⁵ The decisions of the federal circuit courts must be followed by the Commission
23 because, by statute, they are given the authority to definitively interpret FCC orders. 2 U.S.C. §
24 2342(1) (known as the Hobbs Act) states: "The court of appeals (other than the United States
Court of Appeals for the federal circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend
(in whole or in part), or determine the validity of (a) all final orders of the Federal
25 Communications Commission made reviewable by section 402(a) of title 47." 2 U.S.C. §
26 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C.
§ 402(a), none of which applies here.

1 The first statement on the question of the breadth of the *ISP Remand Order* comes in the
2 D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, where the D.C. Circuit stated the
3 *holding* of the *ISP Remand Order*: "In the order before us the [FCC] *held* that under § 251(g) of
4 the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers
5 ("ISPs") *located within the caller's local calling area*."⁶ Thus, the court that was statutorily
6 armed with exclusive jurisdiction to interpret the *ISP Remand Order* states, in plain and
7 unequivocal language, that the *ISP Remand Order* applies *solely* to local ISP traffic.

8 The most definitive subsequent decision is the *Global NAPs I* decision, wherein the First
9 Circuit ruled that the scope of the preemption in the *ISP Remand Order* applies only to local ISP
10 traffic. After the case was fully briefed and argued, the First Circuit panel asked the FCC to
11 comment on the scope of the *ISP Remand Order*, which the FCC did in an *Amicus Brief*.⁷ The
12 ROO in the Level 3 complaint case suggests that, because the FCC declined to opine on the
13 ultimate question of the scope of the *ISP Remand Order*, the *Amicus Brief* leaves the question of
14 the scope of the order in an "unsettled" state. But this position can only be reached by ignoring
15 the very specific comments made by the FCC and by ignoring the clear holding of *Global NAPs*
16 *I*. While declining to take a position on the ultimate question, the FCC was extremely specific
17 and forthright in stating that the *only issue* before the FCC in the *ISP Remand Order* was
18 intercarrier compensation for local ISP traffic:

19 "The administrative history that led up to the *ISP Remand Order* indicates that in
20 addressing compensation, *the Commission was focused on calls between dial-up*
21 *users and ISPs in a single local calling area*. . . . Thus, when the Commission
22 undertook in the *ISP Declaratory Ruling* to address the question "whether a local
exchange carrier is entitled to receive reciprocal compensation for traffic that it
delivers to . . . an Internet service provider," . . . *the proceeding focused on calls*
that were delivered to ISPs in the same local calling area."

23 ***The administrative history does not indicate that the Commission's focus***
24 ***broadened on remand.*** The *ISP Remand Order* repeats the Commission's

25 ⁶ 288 F.3d at 430 (emphasis added).

26 ⁷ A copy of the *Amicus Brief* is attached as Attachment D.

1 understanding that “an ISP’s end-user customers typically access the Internet
2 through an ISP service located in the same local calling area.” . . . *The Order*
3 *refers multiple times to the Commission’s understanding that it had earlier*
4 *addressed – and on remand continued to address – the situation where ‘more*
5 *than one LEC may be involved in the delivery of telecommunications within a*
6 *local service area.’” (Id. at 12-13; citations to ISP Remand Order omitted;*
7 *emphasis added).*

8 Any claim that the *ISP Remand Order* applies to all ISP traffic cannot be squared with the FCC’s
9 own unequivocal statements that only local ISP traffic was at issue. Unless one were to make
10 the unsupported argument that the FCC decided an issue that it acknowledges was not even
11 before it, the only issue FCC could have decided in the order was the compensation regime for
12 local ISP traffic. That is precisely the holding *Global NAPs I*, that the FCC did not preempt the
13 existing access charge rules applicable to interexchange calls placed to ISPs. 444 F.3d at 72.
14 The First Circuit further noted that the *ISP Remand Order* reaffirmed the distinction between
15 reciprocal compensation and access charges:

16 The FCC has consistently maintained a distinction between local and
17 “interexchange” calling and the intercarrier compensation regimes that apply to
18 them, and reaffirmed that states have authority over intrastate access charge
19 regimes. Against the FCC’s policy of recognizing such a distinction, a clearer
20 showing is required that the FCC preempted state regulation of both access
21 charges and reciprocal compensation for ISP-bound traffic. . . .

22 Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction
23 between reciprocal compensation and access charges. It noted that Congress, in
24 passing the TCA, did not intend to disrupt the pre-TCA access charge regime,
25 under which “LECs provided access services ... in order to connect calls that
26 travel to points-both *interstate* and intrastate-beyond the local exchange. In turn,
both the Commission and the states had in place access regimes applicable to this
traffic, which they have continued to modify over time.” *ISP Remand Order* ¶
37. (444 F.3d at 73).

27 The court also quoted several statements from the *Amicus Brief* that supports “the conclusion that
28 the order did not clearly preempt state regulation of intrastate access charges.” *Id.* at 74. Thus,
29 since *Global NAPs I* holds unequivocally that the *ISP Remand Order* did not establish a
30 compensation regime applicable to non-local ISP traffic (VNXX), the Arizona Commission
31 retains authority over intrastate access charges, those charges remain fully in effect, and any

1 change to the tariffs that impose the charges may occur only after proper notice and hearing
2 (neither of which has occurred). The fact that, in the *Amicus Brief*, the FCC did not reach a
3 conclusion on the ultimate issue of the scope of the order is irrelevant because the First Circuit
4 was unequivocal on that issue, concluding through the application of its appellate authority to
5 interpret a federal administrative order that the *ISP Remand Order* applies only to local ISP
6 traffic.

7 In the last three weeks, the D. C. Circuit, in *In re Core Communications*,⁸ and the Second
8 Circuit, in *Global NAPs v. Verizon New England*⁹ (“*Global NAPs II*”), has weighed in on this
9 issue, and both confirm the conclusions reached in *WorldCom* and *Global NAPs I*.

10 In *Core Communications*, the D. C. Circuit (the same court that decided *WorldCom*)
11 upheld the FCC’s order that removed the new markets rule and growth cap rule that were
12 initially adopted in the *ISP Remand Order*. In the course of describing the history leading up to
13 the order under consideration, the court described the *ISP Remand Order*:

14 “[The FCC] found that calls made to ISPs located with the caller’s local calling
15 area fall within those enumerated categories—specifically, that they involve
16 ‘information access.’ . . . Those calls, the FCC concluded, are not subject to §
251(b)(5), but are instead subject to the FCC’s regulatory authority under § 201.
...”¹⁰

17 It is impossible to read this language as anything other than a reaffirmation of the *WorldCom*
18 conclusion that the *ISP Remand Order*’s holding applies only to local ISP traffic.¹¹

19 Finally, on July 5, 2006, the Second Circuit issued the *Global NAPs II* decision, wherein

21 ⁸ 2006 WL 1789003 (D. C. Cir. June 30, 2006).

22 ⁹ 2006 U. S. App. LEXIS 16906 (2nd Cir., July 5, 2006),

23 ¹⁰ 2006 WL 1789003, at *2 (citations to *ISP Remand Order* and other authorities
24 omitted; emphasis added).

25 ¹¹ It is likewise impossible to conclude, given these decisions, that the term “ISP-bound,”
26 as used in the *ISP Remand Order*, is anything other than a term of art used by the FCC to refer to
local ISP traffic. A broader reading of that term results in an illogical, nonsensical result.

1 it affirmed the Vermont Board's decision to ban VNXX in Vermont. The court first concluded
2 that, while the FCC has addressed Internet compensation issues, it "has never directly addressed
3 the issue of ISP-bound calls that cross local-exchange boundaries." 2006 U. S. App. LEXIS
4 16906, at *11. The implication of that statement is obvious. If the FCC has never addressed the
5 issue of terminating compensation for VNXX ISP traffic any suggestion that the *ISP Remand*
6 *Order* applies to all ISP-bound traffic is a logical impossibility. If the FCC has never addressed
7 any issue other than local ISP traffic, it is impossible to say that the *ISP Remand Order* applies to
8 all traffic—the order, by definition, cannot apply to an issue that it did not address. During the
9 course of its decision, the Second Circuit cited *Global NAPs I* approvingly for the proposition
10 that "[t]he ultimate conclusion of [*ISP Remand Order*] was that ISP-bound traffic *within a*
11 *single calling area* is not subject to reciprocal compensation." 2006 U. S. App. LEXIS 16906, at
12 *22, citing *Global NAPs I*.¹²

13 There are only two conclusions that can be reached from these cases. First, the FCC did
14 not even address VNXX ISP traffic in the *ISP Remand Order* and, second, there is no rational
15 way to conclude that the *ISP Remand Order* applies to anything other than what it did address:
16 *local* ISP traffic.¹³ In light of the consistent and identical conclusions reached by each of these
17 courts, it is hard to conceive of an issue that is more firmly settled than the scope of the *ISP*
18 *Remand Order*.

19 ¹² The court also noted that to accept the CLEC's arguments "would allow carriers to
20 operate entirely outside the [access charge] compensation scheme so long as they provide some
21 service to an ISP." 2006 U. S. App. LEXIS 16906, at *27.

22 ¹³ See, e.g., *Neshaminy School Dist. v. Karla B.*, 1997 WL 563421, at *7 (E.D. Pa. 1997)
23 (Holding that an administrative agency "overstepped its authority by addressing an issue not
24 before it. . . . [I]n order for the administrative review system to function properly, issues in
25 dispute must be squarely placed before the agency for its consideration. If the issues are not
26 raised and fully argued before the agency, *then the agency cannot properly decide the issue.*"
(emphasis added). Under this principle and in light of the FCC's own statements that the only
issue before it was local ISP traffic, the *ISP Remand Order* cannot be read, as the ROO does, to
apply more broadly.

1 Thus, in light of the foregoing, Qwest strongly urges the Commission to take a firm
2 position on this issue that is consistent with the body of law described above and firmly conclude
3 that the *ISP Remand Order* applies only to local ISP traffic; the Commission should do so by
4 adopting the first amendment on Attachment A.

5 In addition, the Commission should likewise adopt the other two amendments on
6 Attachment A. The first amendment of those two amendments would remove a sentence (page
7 29, lines 15-17) that is ambiguous and which is not based on any evidence in the record, and
8 which could be read to suggest that some form of undefined “physical presence” by a CLEC in a
9 local calling area would entitle that CLEC to terminating compensation. Such a statement, read
10 broadly, is inconsistent with Commission’s definition of VNXX (see *Commission Order* at 29-
11 30) and other portions of the order that make it clear that the call rating methodology in Arizona,
12 whereby calls are rated based on the location of the parties to a call, is not being altered by this
13 order. Given that this issue was not addressed in the hearing or in briefs, there is no basis to
14 include it in the order, and its inclusion could potentially lead to unnecessary disputes between
15 Level 3 and Qwest. The final amendment would add a parenthetical clause to section 7.3.6.1 to
16 make explicit in the language the Commission’s finding that terminating compensation will be
17 paid only on local ISP traffic.

18 **B. The ROO Should Be Amended To Include Qwest’s Proposed Language Relating To**
19 **Certification and Audits (Qwest Attachment B).**

20 The *Commission Order* rejected Qwest’s proposal (1) requiring Level 3 to certify that
21 VoIP traffic meets the approved definition and (2) the language that would provide Qwest with a
22 right to audit to assure that VoIP calls were properly identified. (*Commission Order* at 56).
23 Ironically, Level 3 never addressed the auditing issue in any manner until its reply brief: it
24 provided neither direct nor rebuttal testimony on the auditing issue, nor did it address the issue in
25 its opening brief. Its only discussion of the issue was in its reply brief at 36, n. 59, where it
26 suggested that auditing would be difficult and burdensome, but without citing any record

1 evidence. As to the certification issue, Level 3 never addressed it in testimony or in either brief.

2 Thus, it is unrebutted that the language is necessary so that Qwest can verify that the
3 traffic that Level 3 identifies as VoIP traffic is valid VoIP traffic entitled to the ESP exemption
4 and is properly classified for billing purposes. It was undisputed that Level 3 agreed to
5 numerous other audit procedures in other portions of the agreement, and even proposed section
6 7.3.9, an auditing provision for company factors. As with auditing provisions, Level 3 agreed to
7 numerous certification requirements in the agreement. Given the benefit of such provisions and
8 Level 3's failure to provide any valid reason to reject them, the Commission should adopt the
9 amendments proposed by Qwest on Attachment B.¹⁴

10

11 **C. The ROO Correctly Decides Issue 2; However, a Technical Correction is Necessary**
12 **So That the Ordering Clause Matches the Order's Resolution of the Issue (Qwest**
Attachment C)

13 Level 3 cast Issue 2 as whether it would be permitted to exchange all traffic types over
14 the same interconnection trunks. However, that is not the real issue.¹⁵ Rather, Issue 2 concerns
15 whether Level 3 should be permitted to terminate interexchange traffic (referred to as "switched
16 access traffic" in Qwest's proposed language) to Qwest over interconnection trunks that do not
17 have the capability to properly record this traffic. This is an even more significant issue now
18 because Level 3 recently acquired Wiltel, a major carrier of interexchange traffic. The Wiltel
19 acquisition means that the volume of interexchange traffic Level 3 delivers to Qwest under the
20 agreement may be substantial.¹⁶

21

22 ¹⁴ See Qwest's Opening Brief at 50 for a more detailed discussion of both issues.

23 ¹⁵ Qwest's proposed paragraph 7.2.2.9.3.2 clearly allows Level 3 to exchange all traffic
24 types over Feature Group D interconnection trunks. Qwest has made its Feature Group D
interconnection trunks capable of carrying all traffic types.

25 ¹⁶ The broad scope of the interexchange services offered by WilTel can be viewed on its
26 website: http://www.wiltel.com/products/content/voice_services/oneplus.htm.

1 The *Commission Order* adopts Qwest's proposed language on Issue 2. (*Commission*
2 *Order* at 72, lines 3-4). Adoption of Qwest's proposed language properly reflects federal law.
3 Level 3's interconnection rights arising under section 251(c) are limited to interconnection that
4 Level 3 uses to provide "telephone exchange service" or "exchange access." Section 251(c)
5 interconnection rights do not encompass or extend to interconnection to be used by the CLEC to
6 terminate its interexchange traffic on the network of the ILEC providing interconnection. Since
7 Level 3 is requesting that a section 251(c) interconnection arrangement be expanded to include
8 termination of its interexchange traffic, it is appropriate for the Commission to require that the
9 interconnection trunks established under the agreement have the capability to properly record
10 this switched access traffic.

11 It is quite apparent from the positions that Level 3 is taking in this proceeding that
12 Feature Group D ("FGD") interconnection trunks are necessary. Qwest and Level 3 have
13 fundamental disagreements as to the applicability of access charges. Moreover, the evidence at
14 hearing demonstrated conclusively that FGD interconnection trunks are necessary so that records
15 can be prepared for independent companies and CLECs who terminate Level 3's traffic. Level
16 3 offered no solution to this problem.

17 The ROO adopts Qwest's proposed language on Issue 2, but did not include all of the
18 pertinent language in the ordering clause. (ROO at 72, lines 3-4). Thus, a technical correction is
19 necessary so that all of the pertinent language is included in the contract. Specifically, Qwest's
20 proposed Sections 7.2.2.9.3.1 and 7.2.2.9.3.1.1 should be referenced. (See *Commission Order* at
21 65, lines 20-28). Qwest, therefore, requests the Commission adopt the amendment set forth on
22 Attachment C.

23 **D. Qwest Comments on New Ordering Provisions.**

24 During the open meeting, the Commission adopted an amendment offered by
25 Commissioner Mayes ("Mayes Amendment") that are incorporated as lines 11-14 of page 82 of
26 the *Commission Order*. During the course of argument in the open meeting, Qwest stated its

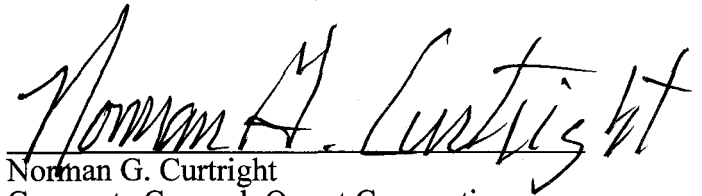
1 opposition to this amendment. However, that opposition was voiced on the assumption that
2 Level 3-proposed language would also be adopted coincident with the Mayes Amendment.
3 Qwest was, and remains, opposed to the Level 3-proposed language for several reasons, the most
4 significant being the fact that its definition of "FX-like traffic" would eviscerate the entire
5 concept of VNXX in Arizona and would directly violate Arizona statutes, prior Commission
6 decisions, and, most importantly, would directly violate several Commission rules. The
7 Commission did not adopt the Level 3-proposed amendment, thus tempering several of the
8 concerns voiced by Qwest in the open meeting.

9 Qwest wishes to note that the term "FX-like traffic" in the order is not defined in the
10 ordering provisions and must be read consistently with the other provisions of the ICA adopted
11 in the *Commission Order*. Furthermore, consistent with its name, an "FX-like" service must be
12 consistent with and like FX service. Qwest will work with Level 3 to adopt an "FX-like"
13 product that can serve Level 3 during the period in which the Commission considers VNXX
14 issues on a generic basis.

16 II. CONCLUSION

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18 On the basis for the foregoing argument, Qwest respectfully requests that the
19 Commission reconsider its order and modify it as requested herein and as specifically set forth on
20 Attachments A, B, and C.

1 RESPECTFULLY SUBMITTED this 19th day of July, 2006.

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ATTACHMENT A

Qwest Petition for Reconsideration
July 19, 2006

Attachment A

____ Passed	THIS AMENDMENT: ____ Passed as amended by _____	
____ Failed	____ Not Offered	____ Withdrawn

PROPOSED AMENDMENT # _____

TIME/DATE PREPARED:

COMPANY: Qwest Corporation

AGENDA ITEM: N/A

DOCKET NO.: T-03654A-05-0350
T-01051B-05-0350

OPEN MEETING DATE: May __, 2006

Page 29, lines 13-14

DELETE: "Because we do not permit the use of VNXX arrangements as Level 3 has proposed them in this case, we do not need to reach the issue of whether the *ISP Remand Order* only applies to 'local' ISP traffic."

INSERT: "Based on our review of four definitive federal circuit court decisions that have addressed the breadth of the *ISP Remand Order*, *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002), *Global NAPs v. Verizon New England*, 2006 444 F. 3d 59, at 71-75 (1st Cir. April 11, 2006) ("*Global NAPs I*"), *In re Core Communications*, 2006 WL 1789003 (D. C. Cir. June 30, 2006), and *Global NAPs v. Verizon New England* ("*Global NAPs II*"), 2006 U. S. App. LEXIS 16906 (2nd Cir., July 5, 2006), and the *Amicus Brief* filed by the FCC with the First Circuit on March 13, 2006 in *Global NAPs I*, we hereby conclude that the *ISP Remand Order* establishes a compensation regime for ISP traffic only in the situation where the calling party and the ISP are located within the same local calling area (as defined by the Arizona Corporation Commission)."

Page 29, lines 15-17

DELETE: "By having a physical presence in the LCA associated with the assigned NPA/NXX, Level 3 would be entitled to reciprocal compensation pursuant to the

Attachment A

ISP Remand Order as well as pursuant to the language of the proposed ICA.”

INSERT: [None].

Page 30, lines 5-7

DELETE: “7.3.6.1 Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC will be billed without limitations as to the number of MOU (“minutes of use”) or whether the MOU are generated in “new markets” as that term has been defined by the FCC, at \$.0007 per MOU or the state ordered rate whichever is lower.”

INSERT: “7.3.6.1 Subject to the terms of this Section, intercarrier compensation for ISP-bound traffic exchanged between Qwest and CLEC (where the end users are physically located within the same Local Calling Area) will be billed without limitations as to the number of MOU (“minutes of use”) or whether the MOU are generated in “new markets” as that term has been defined by the FCC: \$.0007 per MOU or the state ordered rate, whichever is lower.”

ATTACHMENT B

THIS AMENDMENT:		
<input type="checkbox"/> Passed	<input type="checkbox"/> Passed as amended by	<input type="checkbox"/>
<input type="checkbox"/> Failed	<input type="checkbox"/> Not Offered	<input type="checkbox"/> Withdrawn

**PROPOSED
AMENDMENT**
#

TIME/DATE PREPARED: April 24, 2006

COMPANY: Qwest Corporation

AGENDA ITEM: N/A

DOCKET NO.: T-03654A-05-0350
T-01051B-05-0350

OPEN MEETING DATE: May __, 2006

Page 55, lines 26-28

DELETE: “Thus, with respect to Matrix Issue 1A, we adopt Qwest’s proposed Section 7.1.1. For reasons set forth in connection with the next issue, we decline to adopt Qwest’s proposed sections 7.1.1.1 and 7.1.1.2.”

REPLACE: [None]

Page 56, lines 18-22

DELETE: “We believe it would be operationally difficult for Level 3 to provide certification of its end users as required by Qwest’s proposed Section 7.1.1.2, and thus, we do not approve this provision. We find further that Qwest’s proposed language for Section 7.1.1.1 is not reasonable as it places an unnecessary burden on Level 3 and its customers in contravention of the FCC’s goal of limiting burdens on VoIP providers.”

INSERT: “We find that the certification and audit provisions proposed by Qwest in Sections 7.1.1.1 and 7.1.1.2 are reasonable. While certification may be difficult, Level 3 has the opportunity through its contracts with third party VoIP providers to require such providers to limit any VoIP calls that terminate on the PSTN to the VoIP definition we adopt herein. Likewise, the contract has numerous audit provisions. The audit provision proposed by Qwest is reasonable and consistent with other such provisions. Thus, we adopt Qwest’s language.”

ATTACHMENT C

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THIS AMENDMENT:		
<input type="checkbox"/> Passed	<input type="checkbox"/> Passed as amended by _____	
<input type="checkbox"/> Failed	<input type="checkbox"/> Not Offered	<input type="checkbox"/> Withdrawn

**PROPOSED
AMENDMENT**

TIME/DATE PREPARED: April 24, 2006

COMPANY: Qwest Corporation

AGENDA ITEM: N/A

DOCKET NO.: T-03654A-05-0350
T-01051B-05-0350

OPEN MEETING DATE: May __, 2006

Page 72, lines 3-4 (Technical correction)

DELETE: Consequently, we adopt Qwest's proposed language for Sections 7.2.2.9.3.2 and 7.2.2.9.3.2.1.

INSERT: Consequently, we adopt Qwest's proposed language for Issue No. 2 including Sections 7.2.2.9.3.1, 7.2.2.9.3.1.1, 7.2.2.9.3.2 and 7.2.2.9.3.2.1.

ATTACHMENT D

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ARGUED

COPY

No. 05-2657

GLOBAL NAPS, INC.,

Plaintiff-Appellant,

v.

VERIZON NEW ENGLAND, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SAMUEL L. FEDER
GENERAL COUNSEL

DANIEL M. ARMSTRONG
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Qwest Petition for Reconsideration
July 19, 2006

Attachment D

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST AND QUESTIONS PRESENTED	1
BACKGROUND	2
I. Reciprocal Compensation and Access Charges	2
II. Compensation For ISP Access.....	3
III. The Present Dispute.	8
DISCUSSION.....	10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>AT&T Corp. v. Iowa Utilities Board</i> , 525 U.S. 366 (1999).....	11
<i>Bell Atlantic Telephone Companies v. FCC</i> , 206 F.3d 1 (D.C. Cir. 2000).....	5
<i>Dubois v. U.S. Dept. of Agriculture</i> , 102 F.3d 1273 (1 st Cir. 1996), cert. denied, 521 U.S. 1119 (1997).....	13
<i>Western Union Corp. v. FCC</i> , 856 F.3d 315 (D.C. Cir. 1988).....	13
<i>WorldCom Inc. v. FCC</i> , 288 F.3d 429 (D.C. Cir. 2002).....	8
 <u>Administrative Decisions</u>	
<i>Access Charge Reform</i> , 12 FCC Rcd 15982 (1997).....	3
<i>Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking</i> , 20 FCC Rcd 4685 (2005).....	8
<i>Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking</i> , 16 FCC Rcd 9610 (2001).....	8
<i>ISP Declaratory Ruling</i> , 14 FCC Rcd 3689 (1999).....	4, 5, 6, 7, 11, 12
<i>ISP Remand Order</i> , 16 FCC Rcd 9151 (2001).....	2, 6, 7, 8, 9, 10, 11, 12, 13
<i>Local Competition Order</i> , 11 FCC Rcd 15499 (1996).....	2, 3, 12
 <u>Statutes and Regulations</u>	
47 C.F.R. § 51.701.....	6
47 C.F.R. § 51.701(b)(1) (2000).....	12
47 C.F.R. § 51.701(b)(1) (2004).....	6
47 C.F.R. § 57.701 (2000).....	2
47 U.S.C. § 151.....	1
47 U.S.C. § 201.....	7
47 U.S.C. § 251(b)(5).....	1, 2
47 U.S.C. § 251(g).....	6, 8
47 U.S.C. § 252(b).....	9

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 05-2657

GLOBAL NAPS, INC.,

Plaintiff-Appellant,

v.

VERIZON NEW ENGLAND, INC., ET AL.,

Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR AMICUS CURIAE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF INTEREST AND QUESTIONS PRESENTED

Amicus curiae Federal Communications Commission (FCC) is the federal regulatory agency charged by Congress with "regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. In particular, the FCC regulates many aspects of the compensation scheme among telecommunications carriers that collaborate to complete a telephone call. *See, e.g.,* 47 U.S.C. § 251(b)(5). This case involves the Court's interpretation of an FCC order pertaining to compensation for telephone calls placed to internet service providers (ISPs). By order entered January 4, 2006, the Court requested that the FCC file a brief addressing the following questions:

1. Whether, in the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the Commission intended to preempt states from regulating intercarrier compensation for *all* calls placed to internet service providers, or whether it intended to preempt only with respect to calls bound for internet providers in the same local calling area?
2. Whether, if the FCC did not intend to preempt state regulation of all calls, a state regulator's decision to impose access charges on certain calls violates the Telecommunications Act of 1996?
3. What is the standard of review for a reviewing court assessing a state commission's interpretation of an FCC order?

BACKGROUND

I. Reciprocal Compensation and Access Charges.

This case concerns the compensation paid by or to the carriers of telephone calls when more than one carrier collaborates to complete a call. Congress has placed on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In implementing that provision, the FCC determined that the statutory obligation "appl[ies] only to traffic that originates and terminates within a local area," as defined by state regulatory authorities. *Local Competition Order*, 11 FCC Rcd 15499, 16013 ¶1034 (1996) (subsequent history omitted).¹ See 47 C.F.R. § 57.701 (2000) (requiring reciprocal

¹ Although the *Local Competition Order* was the subject of various appeals that ultimately resulted in its partial reversal, no party challenged that aspect of the Order.

compensation for "[t]elecommunications traffic ... that originates and terminates within a local service area established by the state commission"). Thus, when a customer of one carrier places a local, non-toll call to the customer of a competing carrier, the originating carrier must compensate the terminating carrier for completing the call.

In the *Local Competition Order*, the Commission also decided that "the reciprocal compensation provisions of section 251(b)(5) do not apply to the transport or termination of interstate or intrastate interexchange traffic." *Local Competition Order* at 16013 ¶1034. Interexchange traffic is traffic that terminates beyond a local calling area, and it is governed by a different compensation regime. When a customer places a toll or long distance call, the long distance carrier, known as an interexchange carrier or IXC, pays "access charges" to both the originating and terminating local carriers. See *Access Charge Reform*, 12 FCC Rcd 15982, 15990-15992 (1997); *Local Competition Order* at 16013 ¶1034. The Commission decided that the states should "determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local services areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different." *Local Competition Order* ¶1035.

II. Compensation For ISP Access.

In several recent orders, the FCC has addressed the intercarrier compensation regime that applies to calls placed to dial-up internet service

providers (ISPs). Dial-up access involves a customer who seeks to access the Internet via telephone. To do so, the customer dials a telephone number, usually but not always a local number, and is connected with the ISP's equipment. From there, the ISP connects the call to computers throughout the world. *See ISP Declaratory Ruling*, 14 FCC Rcd 3689, 3691 ¶4 (1999). In many cases, such as this one, the ISP is served by one telephone company, typically a competitive local exchange carrier (CLEC), and the dialing-in customer by a different company, typically the incumbent local exchange carrier (ILEC).

Disputes arose between ILECs and CLECs about the intercarrier payment mechanism that governs such calls. The CLECs argued that calls to ISPs are local calls, subject to reciprocal compensation payments, because the calls terminate at the ISP's equipment. The ILECs argued that such calls are not subject to the reciprocal compensation regime because they terminate only at the far-flung computer servers that constitute the world-wide-web.

The FCC first addressed the matter in the *ISP Declaratory Ruling*, 14 FCC Rcd 3689. The Commission noted that in the "typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area." *Id.* at 3691 ¶4. Even though the initial part of the call is local, however, the Commission found that the call, looked at "end-to-end," does not "terminate at the ISP's local server ... but continue[s] to the ultimate destination ... at a[n] Internet website that is often located in another state." *Id.* at 3697 ¶12. ISP-bound calls were not considered local calls subject to reciprocal compensation

under state regulatory auspices, but interstate calls subject to the regulatory authority of the FCC.

The Commission nevertheless acknowledged that at the time it "ha[d] no rule governing inter-carrier compensation for ISP-bound traffic." *ISP Declaratory Ruling* at 3703 ¶22. In the absence of such a rule, the Commission found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." *Id.* at 3703 ¶21. In other words, the FCC left the existing state regulatory mechanisms in place for the time being. At the same time, the Commission began a rulemaking proceeding to formulate a federal rule that would govern ISP-bound calls. *Id.* at 3707-3710.

The D.C. Circuit vacated the *ISP Declaratory Ruling* in *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). It did not question the agency's jurisdictional analysis, *id.* at 7, but found that inquiry not to be "controlling" on the question of whether a call is within the scope of § 251(b)(5), *id.* at 8. The Court also found that the FCC's analysis seemed inconsistent with the Commission's earlier ruling that ISPs were end users that could subscribe to telephone service pursuant to rates established for local service. *Id.* at 7-8. The Court also held that the Commission had failed to make its rules comport with the statute's distinction between "telephone exchange service" and "exchange access." *Id.* at 8-9.

On remand, the Commission issued the *ISP Remand Order*, 16 FCC Rcd 9151 (2001), the interpretation of which is before the Court in this case. The

Commission described the issue it had confronted in the *ISP Declaratory Ruling* as “whether reciprocal compensation obligations apply to the delivery of calls from one LEC’s end-user customer to an ISP in the same local calling area that is served by a competing LEC.” *ISP Remand Order*, 16 FCC Rcd at 9159 ¶13. The Commission determined that ISP-bound calls are not subject to reciprocal compensation payments pursuant to § 251(b)(5). Rather, the Commission found that ISP-bound calls are “information access” calls within the meaning of 47 U.S.C. § 251(g), which states that LECs shall provide information access “with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediate preceding the date of enactment of” the statute. *Ibid.* The Commission interpreted § 251(g) as a “carve-out” of the reciprocal compensation requirement of § 251(b)(5) for calls placed to ISPs. *Id.* at 9166-9167 ¶34.² The Commission found that § 251(g)’s exception to the reciprocal compensation requirement was intended to apply to “all access traffic that [is] routed by a LEC” to an ISP. *Id.* at 9171 ¶44.

The Commission next reiterated its earlier conclusion that calls to ISPs are interstate calls over which the Commission has regulatory authority. *ISP Remand*

² The Commission also changed 47 C.F.R. § 51.701 to reflect the terminology used in § 251(g) of the statute. Instead of referring to “local” calls, a term not used in the statute, the regulation now exempts from the reciprocal compensation requirement “telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.” 47 C.F.R. § 51.701(b)(1) (2004). The Commission made the change because use of the term “local” “created unnecessary ambiguity ... because the statute does not define the term ‘local call,’ [which] ... could be interpreted as meaning either traffic subject to local rates or traffic that is jurisdictionally intrastate.” *ISP Remand Order* at 9172 ¶45.

Order at 9175 ¶52. The Commission analyzed the matter once again under an end-to-end analysis and found that ISP-bound calls are predominantly interstate. *Id.* at 9178 ¶58. As such, under the authority set forth in 47 U.S.C. § 201, the Commission set about developing a federal rule for compensation.

In developing a federal compensation rule, the Commission was particularly concerned about problems that had arisen with reciprocal compensation payments that had been ordered by State utility commissions under the *ISP Declaratory Ruling*. The Commission found that ISP dial-up access had distorted the market and "created the opportunity to serve customers with large volumes of exclusively incoming traffic." *ISP Remand Order* at 9182-9183 ¶69 (emphasis in original). The record showed that CLECs terminated 18 times more calls than they originated, leading to their receipt of net reciprocal compensation payments amounting to nearly \$2 billion annually at the time of the Order. *Id.* at 9183 ¶70. The Commission thus found that, due to this type of regulatory arbitrage, reciprocal compensation had "undermine[d] the operation of competitive markets." *Id.* at 9183 ¶71.

The Commission expressed the view that a "bill and keep" regime under which each carrier collected its costs from its customer and not another carrier would be a viable compensation approach to ISP-bound traffic. *ISP Remand Order* ¶74. The Commission did not, however, employ a "flash cut" – i.e., an immediate transition – to such a regime because the absence of a transition period would "upset the legitimate business expectations of carriers and their customers." *Id.* at 9186 ¶77. The Commission instead instituted an interim compensation

mechanism that placed a declining cap on the rate paid for termination of ISP-bound calls and limited the volume of calls eligible for compensation. *ISP Remand Order* at 9187 ¶78, 9191 ¶86. "This interim regime satisfies the twin goals of compensating LECs for the costs of delivering ISP-bound traffic while limiting regulatory arbitrage." *Id.* at 9189 ¶83.

On review, the D.C. Circuit reversed and remanded, but did not vacate, the *ISP Remand Order*. *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Court held that the Commission's "carve-out" analysis was not consistent with the language of § 251(g) and would allow the Commission to "override virtually any provision of the 1996 Act so long as the rule it adopted were in some way ... linked to LECs' pre-Act obligations." *Id.* at 433. In the meantime, the Commission began a rulemaking proceeding (which is still pending) to examine all aspects of intercarrier compensation, including compensation for ISP-bound calls. *See Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001); *Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4685 (2005).

III. The Present Dispute.

The dispute before the Court involves a variation on the typical ISP dial-up access scenario. The calls at issue are not delivered to an ISP that is located in the caller's local calling area. Instead, the dialing-in customer, served by Verizon, an ILEC, is located in one exchange and the equipment of the ISP, served by Global Naps, a CLEC, is located in a different exchange. Ordinarily, such a call would be

subject to a toll paid by the caller to the IXC (in many cases, the originating LEC acts as the de facto IXC), which would carry the call to the facilities of the terminating LEC. In that way, the originating LEC, acting in the role of an IXC, would pay a terminating access charge to the terminating LEC. In order to allow the customer to reach the ISP without paying a toll, however, Global Naps has assigned a virtual or "VNXX" number to the ISP. A VNXX number is a telephone number that appears to be assigned to one exchange but actually is assigned to a customer in a different exchange. Thus, when the Verizon customer calls the ISP – a phone call ordinarily subject to toll charges – he does not incur any toll charges, because the switching equipment treats the call as a local call even though it is not.

That arrangement led to a dispute between Verizon and Global Naps over the applicable payment regime. Global Naps claimed that ISP-bound VNXX calls are entitled to compensation from Verizon under the federal regime established in the *ISP Remand Order*. Verizon claimed that the federal compensation plan applied only to calls delivered to an ISP in the same local calling area and that Verizon was entitled to state-ordered access charge compensation for VNXX calls to make up for the lost toll revenue that resulted from Global Naps' use of VNXX numbers. The parties submitted their dispute to the Massachusetts Department of Telecommunications and Energy (DTE) for arbitration pursuant to the process set forth in 47 U.S.C. § 252(b).

DTE ruled that "VNXX calls will be rated as local or toll based on the geographic end points of the call." DTE Order at 33 (App. 611). As such, DTE accepted language proposed by Verizon to govern compensation for VNXX calls.

Id. at 37-38 (App. 615-616). That language would require Global Naps to “pay Verizon’s originating access charges for all [VNXX] traffic originated by a Verizon Customer ...” App. 867. Thus, DTE effectively required Global Naps to pay access charges for ISP-bound calls made to VNXX numbers.

The district court affirmed the DTE order. The court took note of Global Naps’ argument that the *ISP Remand Order* preempted state regulation of compensation for ISP-bound calls, but rejected the claim on the ground that Global Naps had “impliedly consented to DTE’s jurisdiction” over the rates when it voluntarily sought arbitration.” *Memorandum of Decision* in Civil Action No. 02-12489 (Sept. 21, 2005) (App. 1164).

DISCUSSION

The Court has asked us to address whether the *ISP Remand Order* was intended to preempt states from establishing the compensation regime that governs a call placed by an ILEC customer in one exchange to a CLEC-served ISP located in a different exchange using a VNXX number assigned to the ISP by the CLEC. The *ISP Remand Order* does not provide a clear answer to this question. As set forth below, the *ISP Remand Order* deemed *all* ISP-bound calls to be interstate calls subject to the jurisdiction of the FCC, and the language of the *ISP Remand Order* is sufficiently broad to encompass all such calls within the payment regime established by that Order. Nevertheless, the order also indicates that, in establishing the new compensation scheme for ISP-bound calls, the Commission was considering only calls placed to ISPs located in the same local calling area as the caller. The Commission itself has not addressed application of the *ISP Remand*

Order to ISP-bound calls outside a local calling area. Nor has the Commission decided the implications of using VNXX numbers for intercarrier compensation more generally. In this situation, the Commission's litigation staff is unable to advise the Court how the Commission would answer the first question posed by the Court.

In the *ISP Remand Order* (as in the *ISP Declaratory Ruling*), the Commission found that calls to ISPs are interstate calls subject to federal regulatory jurisdiction. At the same time, Congress in § 252 gave the States significant authority over interconnection agreements between carriers. Thus, while "Congress has broadly extended its law into the field of intrastate telecommunications," in a few areas such as interconnection agreements Congress "has left the policy implications of that extension to be determined by state commissions." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 385 n.10 (1999).

In some respects, the *ISP Remand Order* appears to address all calls placed to ISPs. The Commission's ruling that calls to ISPs are interstate calls because they may terminate at web sites beyond state boundaries necessarily applies to all ISP-bound calls. The Commission's theory that ISP-bound calls are "information access" calls within the meaning of § 251(g) that are thus exempted from the requirements of § 251(b) likewise applies to all ISP-bound calls. The *ISP Remand Order* is also replete with references to "ISP-bound calls" that do not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas.

At the same time, however, the administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area. The *Local Competition Order* and the regulations promulgated pursuant to that order contemplated that reciprocal compensation would be paid only for calls that "originat[e] and terminat[e] within a local service area." 47 C.F.R. § 51.701(b)(1) (2000); see *Local Competition Order* at 16013 ¶1034. Thus, when the Commission undertook in the *ISP Declaratory Ruling* to address the question "whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to ... an Internet service provider," *id.* at 3689 ¶1, the proceeding focused on calls that were delivered to ISPs in the same local calling area. Indeed, the Commission described the "typical arrangement" (although not the exclusive arrangement) it had in mind as one where "an ISP customer dials a seven-digit number to reach the ISP service in the same local calling area." *Id.* at 3691 ¶4.

The administrative history does not indicate that the Commission's focus broadened on remand. The *ISP Remand Order* repeats the Commission's understanding that "an ISP's end-user customers typically access the Internet through an ISP service located in the same local calling area." *Id.* at 9157 ¶10. The Order refers multiple times to the Commission's understanding that it had earlier addressed – and on remand continued to address – the situation where "more than one LEC may be involved in the delivery of telecommunications

within a local service area.” *Id.* at 9158 ¶12; *see also id.* at 9159 ¶13, 9163 ¶24, 9180 ¶63.

The *ISP Remand Order* thus can be read to support the interpretation set forth by either party in this dispute. The Commission itself, however, has not expressed a position on the matter. Moreover, the Commission has not addressed the more general effects on intercarrier compensation of the use of VNXX numbers. In the circumstances, it would not be possible for the Commission’s litigation staff to provide an official position on a matter that the Commissioners themselves have not yet directly confronted and addressed in a rulemaking or adjudicatory proceeding. As this Court has recognized, post hoc rationalizations offered by agency counsel are not substitutes for an agency order issued in the appropriate manner. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1289 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997); *see also Western Union Corp. v. FCC*, 856 F.3d 315, 318 (D.C. Cir. 1988) (agency rationale “must appear in the agency decision and the record; post hoc rationalizations by agency counsel will not suffice”).


The Court also asked the FCC if any other provisions of the Telecommunications Act of 1996 would prohibit a State from imposing access charges on ISP-bound VNXX calls. As described above, the Commission did not directly address VNXX calls in either of its ISP orders and has not addressed VNXX calls more generally. In the circumstances, we are unable to advise the Court whether the Commission might in the future interpret any provision of the Communications Act to prohibit State-imposed access charges. For similar

reasons, we are unable to address the Court's third question regarding the standard of review of a state commission interpretation of FCC orders, another matter on which the Commission has not spoken.

Respectfully submitted,

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Handwritten signature of Joel Marcus, written in dark ink, appearing as 'Joel Marcus' in a cursive style.

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March 13, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GLOBAL NAPS, Inc.,

PLAINTIFF-APPELLANT,

V.

VERIZON NEW ENGLAND, INC., ET AL.,

DEFENDANTS-APPELLEES.

No. 05-2657

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify
that the accompanying "Brief for Amicus Curiae Federal Communications
Commission" in the captioned case contains 3432 words.



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March 13, 2006

CERTIFICATE OF SERVICE

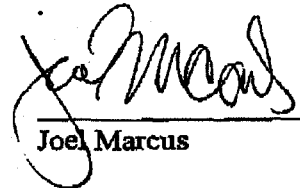
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